Polygram Records Sdn Bhd v The Search & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2–22–52–88
VISU SINNADURAI J
5 AUGUST 1994

Contract — *False misrepresentation — Group clearly intended to contract with recording company — Understood nature, duration and obligations under the contract*

Contract — *Inequality of bargaining power — Contracts grossly unfair to the other side may be set aside on grounds of public policy — Contracts Act 1950 s 24(e)*

Contract — *Non est factum — Need to prove that the contract was 'radically or substantially or fundamentally' different*

Contract — *Parties — Contract between rock group and recording company — Whether contract was with individual members of the group or with the group itself*

Contract — *Recording contract — Standard contract used — Group began recording for another company — Whether breach of contract — Whether contract still binding on group — Whether contract voidable on grounds of undue influence, false misrepresentation, inequality of bargaining power or restraint of trade — Need for recording company to review terms of recording contracts with artistes — Factors to be considered by recording company —Contracts Act 1950 ss 16, 24, 28, 63*

Contract — *Rescission — Second contract entered into — Whether first contract rescinded and substituted by second contract — Intention of parties — Contracts Act 1950 s 63*

Contract — *Restraint of trade — Covenant to provide exclusive recording rights during currency of contract — Covenant to restrain a person from carrying on trade or profession in the post-contract period — Whether both types of covenant void — Contracts Act 1950 s 28*

Contract — *Terms — Later clause in the contract inconsistent with earlier clause or main object of the contract — Whether later clause void*

Contract — *Undue influence — Relationship of trust and confidence which allowed contract to be procured — Whether contract 'unconscionable' or one of manifest disadvantage — Contracts Act 1950 s 16*

Contract — *Written contract — Party claimed that contract not binding as they had not agreed to the terms of the contract — Whether bound regardless — Circumstances when party won't be bound*

Copyright — *Sound recordings — Application for copyright of songs recorded with record company to be reassigned to artiste — Whether copyright belongs to artiste or recording company*

Tort — *Inducement of breach of contract — Recording contract — Whether group induced to breach contract with recording company*

The plaintiffs, Polygram Records Sdn Bhd, entered into a written agreement ('the first contract') with a rock group, The Search ('the group'), on 7 October 1984. They were signed on by Eric Yeoh ('Eric'), the then artiste and repertoire manager of the plaintiffs. The first contract was for a period of two years, with an option for two further periods of one year each, exercisable at the discretion of the plaintiffs, and not the group.

On 12 June 1985, a new contract ('the second contract') was entered into between the plaintiffs and the group, purportedly for the reason that there were some changes in the composition of the group. Although the second contract contained many provisions which were identical to that contained in the first contract, there was a major modification, which the group claimed was not brought to their attention. The modification was that the period of option which the members of the group granted to the plaintiffs was extended to two additional periods of 24 months each, instead of the two additional periods of 12 months each under the first contract. It was established during the trial that no copy of the second contract was ever given to the group until 1987, when the solicitor acting for the group requested a copy of it for the purposes of the present action.

After the release of the third album with Polygram in February 1987, it was clear that the group was dissatisfied with their existing arrangements with Polygram and sometime at the end of 1987, the group made the recording of an album under a new company, Go-Search. Go-Search was a company incorporated by the members of the group themselves. The company did only the recordings, whilst another company, Pacific Music Corp (M) Sdn Bhd ('the sixth defendant') did the distribution.

In 1988, Polygram commenced proceedings against the group for breach of contract and against the sixth defendant for inducing the group to breach their contract with Polygram. The group counterclaimed, inter alia, for a declaration that both the contracts were voidable on the grounds of undue influence; for the assignment of the relevant copyright in all the songs recorded by the group with the plaintiff; and for a declaration that a clause in the second contract was void in restraint of trade.

The issue before the court was whether at the time when the group began recording for Go-Search, in late 1987, they were still contractually bound to Polygram, either under the terms of the first contract or the second contract.

Held, dismissing the plaintiffs' claim and allowing part of the group's counterclaim:

(1) Considering the circumstances and the evidence adduced, the members of the group understood the nature of the first contract; the duration of the contract; their obligations to record for Polygram; and that royalties would be paid to them. There was,

therefore a clear intention on their part to enter into the recording contract with Polygram and was therefore no misrepresentation and least of all undue influence when the group entered into the first contract.

(2) A party who signs a written contract is bound by the terms of the contract, except in the limited cases where fraud, undue influence or misrepresentation may be established. Therefore, the argument by the group that the first contract was not binding on them since they did not 'agree to the terms' could be dismissed summarily.

(3) Whilst it was true that the initial period of the first contract expired on 6 October 1986, and there was no evidence that the plaintiffs had exercised their rights under the option to extend the duration of the first contract, the plaintiffs themselves never contemplated any extension of the first contract as they had always acted on the belief that the first contract was substituted by the second.

(4) If a new contract is entered into by the parties, whatever its terms, the old contract is extinguished. In the present case, the clear intention of both the parties was to replace the first contract with the second contract. The group, therefore, was under no obligation to perform their part of the bargain under the first contract, as the first contract had been extinguished. After substitution by the second contract, no rights or liabilities could arise out of the first contract.

(5) Therefore, the first contract was not in force at the time when the group began recording for Go-Search and no question as to the group having breached their obligations under the first contract arose in this case.

(6) There was insufficient evidence to find that the second contract was voidable by reason of false misrepresentation.

(7) By virtue of s 28 of the Contracts Act 1950 ('the Act'), agreements entered into under undue influence are voidable. In this case, there was evidence to show that there existed a close relationship between the group and Eric which was a relationship of trust and confidence. Therefore, Eric was in a position to procure them to enter into the second contract. For these reasons, the presumption of undue influence arises. However, before the group may set aside the contract on the grounds of undue influence, they must prove that the contract was 'unconscionable' or one of manifest disadvantage to them. The terms in the second agreement were not new terms, but merely those which were already known to the group, by virtue of the first contract. Although the period of the contract was extended under the second contract, the duration was not such as to render the entire contract manifestly disadvantageous to the group.

(8) Although the second contract was valid and legally binding between the parties, there was no evidence at all to indicate that the plaintiffs had exercised their rights to extend the period of the second contract for a further term of two years. Therefore, the contract had lapsed before the group began recording for Go-Search. A B

(9) The covenant, whereby the group undertook to provide exclusive recording rights to the plaintiffs during the currency of their recording contract, was not a covenant in restraint of trade and was therefore not rendered void under s 28 of the Act. Section 28 is only applicable in cases where a person is restrained from carrying on his trade or profession in the post-contract period and not during the currency of the contract. It therefore follows that a clause in the second contract which was a covenant in restraint of trade was void ab initio and not binding on the group when they began recording for Go-Search. C

(10) Therefore, the group was not in breach of any contract with Polygram when they began recording for Go-Search. The plaintiffs claim against the group failed. As a result of that, the plaintiffs' claim against the sixth defendant for inducing the group to breach their contract with Polygram must necessarily fail. D E

(11) Under the law relating to copyright of sound recordings, the copyright to the sound recordings belongs to the plaintiffs, and as such no question of reassignment of such copyright to the group arises in this case.

(12) The plaintiffs were to pay the group all royalties due to them under the second contract, in respect of the sales of all the four albums recorded by the group, in accordance with cl 5(1) of the second contract even though cl 5(6) states that where the group was no longer contractually bound by the plaintiffs, they were only entitled to receive 50% of the royalty rates payable. This was because where a later clause in a contract destroys the effect of an earlier clause, or where a clause in a contract is inconsistent with the main object of the contract, the later clause may be rejected as being repugnant to the earlier clause or to the main object of the contract. Clause 5(6) was therefore void. F G H

Obiter:

(1) In this case, in both the first and the second contracts, reference was made throughout the contracts as though each and every one of the members of the group was entering into a separate and individual contract with Polygram. If the contract was with individual members of the group, then clearly only those who were parties to the relevant contract were bound by the terms of I

that particular contract. However, if it was intended that the contract was to be with Polygram and The Search, as a group, then the legal status of the group was unclear: whether it was an association, a corporation, a partnership, or merely as individuals. The advantage of such an entity is that, as the contract is entered into with a legal entity, any change in the membership of the group would not affect the legal status of the contract. The contract remained with the group and not with the individual members. Although these issues were not directly addressed by the group to challenge the liability of some of the group, recording companies and artistes need to pay more heed to such issues.

(2) One exceptional circumstance under which a party to a written contract may seek to set it aside is on the grounds of non est factum. Non est factum was not pleaded in the present case to challenge the validity of the first contract, and even if it had been pleaded, the group would not be in a position to establish that the contract entered into by them was 'radically or substantially or fundamentally' different to that they had intended to sign.

(3) Even if the element of manifest disadvantage need no longer be established as a separate requirement in cases of presumed undue influence, the group still might not be able to set aside the second contract as they appeared to have affirmed the contract.

(4) In Malaysia, there is some support for the view that, public policy may, in some exceptional cases, demand that certain contracts which are grossly unfair to one of the parties ought to be set aside on the grounds of inequality of bargaining power under s 24(e) of the Act.

[Bahasa Malaysia summary

Plaintif, Polygram Records Sdn Bhd, telah mengikat suatu perjanjian bertulis ('kontrak pertama') dengan sebuah kumpulan rock, The Search ('kumpulan itu') pada 7 Oktober 1984. Mereka telah didaftarkan oleh Eric Yeoh ('Eric'), pengurus artis dan repertoir plaintif pada masa itu. Kontrak pertama adalah untuk masa dua tahun, dengan opsyen dua tempoh lagi untuk satu tahun setiap satu, yang boleh dilaksanakan pada budi bicara plaintif dan bukan kumpulan itu.

Pada 12 Jun 1985, suatu kontrak baru ('kontrak kedua') telah diikat di antara plaintif dan kumpulan itu, kerana dikatakan terdapat pertukaran dalam komposisi kumpulan itu. Walaupun kontrak kedua mempunyai banyak peruntukan yang sama dengan peruntukan yang terkandung dalam kontrak pertama, terdapat modifikasi yang penting, yang kumpulan itu berhujah tidak dibawa kepada pengetahuan mereka. Modifikasi itu adalah bahawa tempoh opsyen yang telah diberi oleh kumpulan itu kepada plaintif telah dilanjutkan bagi dua tempoh lagi untuk 24 bulan tiap-tiap satu, dan bukan dua tempoh

lagi untuk 12 bulan tiap-tiap satu dalam kontrak pertama itu. Telah dibuktikan pada perbicaraan bahawa sesalinan kontrak kedua tidak pernah diberi kepada kumpulan itu sehingga tahun 1987, apabila peguamcara pihak plaintif telah meminta supaya sesalinan kontrak itu diberikan kepada mereka bagi tujuan perbicaraan masakini.

Selepas album ketiga bersama Polygram dikeluarkan pada bulan Februari 1987, adalah jelas bahawa kumpulan itu tidak berpuas hati dengan perjanjian yang wujud dengan Polygram dan pada penghujung tahun 1987, kumpulan itu telah merakam sebuah rekod dengan sebuah syarikat yang baru, Go-Search. Go-Search merupakan sebuah syarikat yang telah diperbadankan oleh ahli-ahli kumpulan itu sendiri. Syarikat itu hanya membuat rakaman manakala sebuah syarikat yang lain, Pacific Music Corp (M) Sdn Bhd ('defendan keenam') membuat pengedaran.

Dalam tahun 1988, Polygram telah memulakan prosiding terhadap kumpulan itu untuk kemungkiran kontrak dan terhadap defendant keenam kerana mendorong kumpulan itu untuk memungkiri kontrak mereka dengan Polygram. Kumpulan itu telah membuat tuntutan balas untuk, antara lain, suatu deklarasi bahawa kedua-dua kontrak itu boleh batal atas alasan pengaruh tidak wajar; untuk penyerahhakkan tanda niaga yang relevan dalam kesemua lagu yang telah dirakam oleh kumpulan itu dengan plaintif; dan untuk suatu deklarasi bahawa suatu fasal di dalam kontrak kedua itu adalah tidak sah kerana menyekat perniagaan.

Isu di hadapan mahkamah adalah sama ada pada masa kumpulan itu mula membuat rakaman untuk Go-Search pada penghujung 1987, mereka masih diikat oleh kontrak dengan Polygram, sama ada di bawah terma kontrak pertama atau kontrak kedua.

Diputuskan, menolak tuntutan plaintif dan membenarkan sebahagian daripada tuntutan balas kumpulan itu:

(1) Memandangkan keadaan dan keterangan yang telah dikemukakan, ahli kumpulan itu memahami sifat kontrak pertama itu; jangka masa kontrak itu; obligasi mereka untuk membuat rakaman untuk Polygram; dan royalti yang akan dibayar kepada mereka. Oleh itu, terdapat niat yang nyata pada pihak mereka untuk mengikat kontrak rakaman dengan Polygram dan dengan itu tidak terdapat salah nyataan apatah lagi pengaruh tidak wajar apabila kumpulan itu mengikat perjanjian pertama itu.

(2) Sesebuah pihak yang menandatangani kontrak bertulis diikat oleh terma kontrak itu, kecuali di dalam kes terhad di mana fraud, pengaruh tidak wajar atau salah nyataan boleh dibuktikan. Oleh itu, hujahan oleh kumpulan itu bahawa kontrak pertama itu tidak mengikat mereka kerana mereka tidak 'bersetuju dengan terma' boleh diketepikan secara terus.

A (3) Walaupun benar bahawa tempoh permulaaan kontrak pertama itu telah tamat pada 6 Oktober 1986, dan tidak terdapat keterangan bahawa plaintif telah menggunakan hak mereka di bawah opsyen untuk melanjutkan tempoh kontrak pertama, plaintif sendiri tidak berfikir hendak melanjutkan kontrak pertama itu kerana mereka telah bertindak atas kepercayaan B bahawa kontrak pertama itu telah diganti oleh kontrak kedua.

(4) Jika suatu kontrak pertama diikat oleh kedua-dua pihak, apa sahaja termanya, kontrak yang lama akan dihapuskan. Di dalam kes ini, niat kedua-dua pihak yang nyata adalah supaya kontrak pertama diganti oleh kontrak kedua. Oleh itu, kumpulan itu C tidak berobligasi untuk melaksanakan persetujuan mereka di bawah kontrak pertama, kerana kontrak pertama telah dihapuskan. Selepas diganti oleh kontrak kedua, hak atau liabiliti tidak boleh bangkit daripada kontrak pertama itu.

(5) Oleh itu, kontrak pertama tidak berkuatkuasa pada masa D kumpulan itu mula membuat rakaman untuk Go-Search dan tidak boleh dipersoalkan di dalam kes ini sama ada kumpulan itu telah memungkiri obligasi mereka di bawah kontrak pertama itu.

(6) Tidak terdapat keterangan yang mencukupi untuk memutuskan E bahawa kontrak kedua itu adalah boleh batal kerana salah nyataan palsu.

(7) Mengikut s 28 Akta Kontrak 1950 ('Akta itu'), perjanjian yang telah diikat disebabkan oleh pengaruh tidak wajar adalah boleh batal. Di dalam kes ini, terdapat keterangan yang menunjukkan bahawa terdapat hubungan yang dekat di antara kumpulan itu F dengan Eric yang merupakan suatu hubungan berdasarkan kepercayaan dan keyakinan. Oleh itu, Eric berkedudukan untuk mengikat kontrak kedua dengan kumpulan itu. Untuk sebab-sebab ini, anggapan pengaruh tidak wajar boleh timbul. Akan tetapi, sebelum kumpulan itu boleh mengetepikan kontrak itu G atas alasan pengaruh tidak wajar, mereka mesti membuktikan bahawa kontrak itu adalah 'tidak berpatutan' ('unconscionable') atau suatu kontrak sangat merugikan bagi pihaknya. Terma kontrak yang kedua tidak merupakan terma yang baru, disebabkan oleh kontrak pertama itu. Walaupun tempoh kontrak itu telah dilanjutkan di bawah kontrak kedua itu, tempoh itu H tidak menjadikan keseluruhan kontrak itu sangat merugikan kepada kumpulan itu.

(8) Walaupun kontrak kedua itu adalah sah dan mengikat di sisi undang-undang di antara kedua-dua buah pihak, tidak terdapat sebarang bukti yang menunjukkan bahawa plaintif telah I menggunakan hak mereka untuk melanjutkan tempoh kontrak kedua itu untuk dua tahun lagi. Oleh itu, kontrak itu telah luput sebelum kumpulan itu mula membuat rakaman untuk Go-Search.

(9) Waad itu, dalam mana kumpulan itu berjanji untuk memberi hak rakaman yang eksklusif kepada plaintif dalam tempoh kontrak rakaman mereka, tidak merupakan waad penyekatan perniagaan dan oleh itu, tidak dijadikan tidak sah di bawah s 28 Akta itu. Seksyen 28 hanya terpakai di dalam kes-kes di mana seseorang disekat daripada menjalankan pekerjaan atau profesyennya di dalam tempoh selepas kontrak itu dan tidak di dalam tempoh kontrak itu. Oleh itu, suatu fasal di dalam kontrak kedua yang merupakan suatu waad penyekatan perniagaan adalah tidak sah ab initio dan tidak mengikat kumpulan itu apabila mereka mula membuat rakaman untuk Go-Search.

(10) Oleh itu, kumpulan itu tidak memungkiri sebarang kontrak dengan Polygram apabila mereka mula membuat rakaman untuk Go-Search. Tuntutan plaintif terhadap kumpulan itu telah gagal. Oleh itu, tuntutan plaintif terhadap defendan keenam kerana mendorong kumpulan itu untuk memungkiri kontrak mereka dengan Polygram semestinya gagal.

(11) Di bawah undang-undang yang berkaitan dengan tanda niaga rakaman suara, tanda niaga rakaman suara itu dipunyai oleh plaintif, dan oleh kerana itu, soalan mengenai penyerahhakkan tanda niaga kepada kumpulan itu tidak timbul di dalam kes ini.

(12) Plaintif dikehendaki membayar kepada kumpulan itu kesemua royalti yang dihutang kepada mereka di bawah kontrak kedua itu, berkenaan dengan penjualan empat album yang telah dirakam oleh kumpulan itu, berdasarkan fasal 5(1) di dalam kontrak kedua walaupun fasal 5(6) menyatakan bahawa apabila kumpulan itu tidak lagi diikat oleh kontrak dengan plaintif, mereka hanya berhak menerima 50% daripada kadar royalti yang perlu dibayar. Ini adalah kerana di mana suatu fasal yang terkemudian di dalam suatu kontrak menghilangkan keberkesanan fasal yang lebih awal, atau apabila suatu fasal di dalam suatu kontrak adalah tidak konsisten dengan tujuan utama kontrak itu, fasal yang terkemudian itu boleh diketepikan kerana ianya adalah bertentangan dengan fasal yang lebih awal itu atau bertentangan dengan tujuan utama kontrak itu. Oleh itu, fasal 5(6) adalah tidak sah.

Obiter:

(1) Di dalam kes ini, di dalam kontrak yang pertama dan yang kedua, rujukan telah dibuat di dalam keseluruhan kedua-dua kontrak itu seolah-olah setiap ahli kumpulan itu telah mengikat kontrak yang berasingan dengan Polygram. Jika kontrak itu diikat dengan setiap ahli kumpulan itu, adalah jelas bahawa hanya mereka yang merupakan pihak kepada kontrak yang relevan itu diikat oleh terma kontrak itu. Akan tetapi, jika dimaksudkan supaya kontrak itu diikat di antara Polygram dan The Search, sebagai satu kumpulan, taraf undang-undang kumpulan itu adalah

tidak jelas: sama ada ia merupakan suatu persatuan, suatu perbadanan, suatu perkongsian, atau hanya sebagai individu. Kelebihan suatu entiti sedemikian adalah bahawa, oleh kerana kontrak itu telah diikat dengan suatu entiti undang-undang, sebarang pertukaran di dalam keahlian kumpulan itu tidak akan mempengaruhi taraf undang-undang kontrak itu. Kontrak itu dimiliki oleh kumpulan itu dan bukan oleh ahli secara individu. Walaupun isu ini tidak dikemukakan secara langsung oleh kumpulan itu untuk mencabar liabiliti sesetengah orang di dalam kumpulan itu, syarikat rakaman dan artis perlu memberi pertimbangan yang lebih kepada isu sedemikian.

(2) Suatu keadaan terkecuali di mana sesebuah pihak kepada suatu kontrak yang bertulis boleh cuba mengetepikannya adalah atas alasan non est factum. Non est factum, tidak dijadikan pli dalam kes ini untuk mencabar keesahan kontrak pertama, dan walaupun ia dijadikan pli, kumpulan itu tidak akan berkedudukan untuk membuktikan bahawa kontrak yang telah diikat oleh mereka adalah berlainan 'secara radikal atau secara substansial atau secara dasarnya' daripada yang ingin ditandatangani oleh mereka.

(3) Walaupun unsur kerugian yang manifes tidak perlu dibuktikan sebagai suatu keperluan yang berasingan di dalam kes-kes di mana pengaruh tidak wajar dianggap hadir, kumpulan itu masih tidak akan dapat mengetepikan kontrak kedua kerana mereka nampaknya telah mengesahkan kontrak itu.

(4) Di Malaysia, terdapat sokongan untuk pendapat bahawa, polisi awam boleh, di dalam keadaan yang tertentu, mengkehendaki supaya kontrak tertentu yang terlampau tidak saksama kepada sebelah pihak diketepikan atas alasan bahawa terdapat ketidaksamaan kuasa tawar-menawar di bawah s 24(e) Akta itu].

Notes

For a case on inducing the breach of contract, see 12 *Mallal's Digest* (4th Ed) para 166.

For cases on non est factum, see 3 *Mallal's Digest* (4th Ed, 1994 reissue) paras 1917–1924; [1990] Mallal's Digest 176–177; [1991] Mallal's Digest 762–763.

For a case on the parties to a contract, see 3 *Mallal's Digest* (4th Ed, 1994 reissue) para 1956.

For cases on the rescission of a contract, see 3 *Mallal's Digest* (4th Ed, 1994 reissue) paras 2017–2047; [1989] Mallal's Digest 240, 228, 238–239.

For cases on restraint of trade, see 3 *Mallal's Digest* (4th Ed, 1994 reissue) paras 2049–2060; [1990] Mallal's Digest 183; [1992] Mallal's Digest 619.

For cases on the terms of a contract, see 3 *Mallal's Digest* (4th Ed, 1994 reissue) paras 2196–2255; [1989] Mallal's Digest 216–

220; [1990] Mallal's Digest 172; [1991] Mallal's Digest 783–786; [1992] Mallal's Digest 636–640.

For cases on undue influence, see 3 *Mallal's Digest* (4th Ed, 1994 reissue) paras 2281–2290; [1990] Mallal's Digest 185–187; [1991] Mallal's Digest 790–791; [1992] Mallal's Digest 642.

Cases referred to

Arrale v Costain Civil Engineering Ltd [1976] 1 Lloyd's Rep 98 (refd)
Bank of Credit and Commerce International SA v Aboody [1990] 1 QB 923; [1992] 4 All ER 955; [1989] 2 WLR 759 (refd)
Barclays Bank plc v O'Brien & Anor [1993] 4 All ER 417 (refd)
CIBC Mortgages plc v Pitt & Anor [1993] 4 All ER 433 (refd)
Cheese v Thomas [1994] 1 All ER 35 (refd)
Clifford Davis Management Ltd v WEA Records Ltd [1975] 1 All ER 237; [1975] 1 WLR 61 (refd)
Datuk Jagindar Singh & Ors v Tara Rajaratnam [1983] 2 MLJ 196 (refd)
Elton John & Ors v Richard Leon James & Ors [1991] FSR 397 (refd)
Hua Khiow Steamship Co Ltd v Chop Guan Hin (1930) 1 MC 75 (refd)
L'Estrange v F Graucob Ltd [1934] 2 KB 394 (refd)
Levison v Patent Steam Carpet Cleaning Co Ltd [1978] QB 69; [1977] 3 All ER 498; [1977] 3 WLR 90 (refd)
Lloyds Bank Ltd v Bundy [1975] QB 326; [1974] 3 All ER 757; [1974] 3 WLR 501 (refd)
Naested v State of Perak (1925) 5 FMSLR 185 (refd)
National Westminster Bank plc v Morgan [1985] AC 686; [1985] 1 All ER 821; [1985] 2 WLR 588 (refd)
O'Sullivan v Management Agency and Music Co Ltd [1985] QB 428; [1985] 3 All ER 351; [1984] 3 WLR 477 (refd)
Panayiotou & Ors v Sony Music Entertainment (UK) Ltd (*The Times*, 30 June 1994) (unreported) (refd)
Pao On v Lau Yiu Long [1980] AC 614; [1979] 3 All ER 65; [1979] 3 WLR 435 (refd)
Polygram Records Sdn Bhd v Hillary Ang & Ors [1988] 3 MLJ 37 (refd)
Poosathurai v Kannappa Chettiar (1919) 47 IA 1 (folld)
Raghunath Prasad v Sarju Prasad AIR (1924) PC 60 (refd)
Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616; [1974] 1 WLR 1308 (refd)
Silverstone Records v Gary Mountfield & Ors (1991) (unreported) (refd)
United Dominions Corp (Jamaica) Ltd v Michael Mitri Shoucair [1969] 1 AC 340; [1968] 3 WLR 893 (refd)
Wrigglesworth v Wilson Anthony [19164] MLJ 269 (refd)
Yap Chee Meng v Ajinomoto (Malaysia) Bhd [1978] 2 MLJ 249 (refd)
Zang Tumb Tuum Records v Holly Johnson (*The Independent*, 2 August 1989) (unreported) (refd)

Legislation referred to

Contracts Act 1950 ss 16, 20, 24(e), 28, 63
Contract Act [Ind] s 16

Wong Sai Fong and *N Navaratnam* (*Shearn Delamore & Co*) for the plaintiffs.

Muhammad Shafee Abdullah and *M Puravalen* (*Shafee & Co*) for the defendants.

Visu Sinnadurai J: This case deals with the legal effect of two recording contracts entered into between the plaintiffs, Polygram, a recording company, and a group of young artistes known as The Search.

This court is also called upon to determine whether the principles applied by the English courts in certain recent cases are equally applicable in Malaysia to the local music industry. I am given to understand that this is the first case of this nature, where the validity of such a recording contract is being considered by a Malaysian court. This decision, I am told, therefore, has some important bearings especially to the recording and performing arts industry in the country.

The validity of similar recording contracts as those entered into between the plaintiffs and the defendants, whereby a young artiste undertakes to record for a particular recording company for a specified duration, and upon terms and conditions imposed by the company, has come under close scrutiny in recent years, especially by the English courts.

In *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616; [1974] 1 WLR 1308, the House of Lords upheld the decision of the judge at first instance who had held a contract between a songwriter and a music publishing company for an initial period of five years, to be against public policy as being in restraint of trade, and thus void. Soon after, in *Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 All ER 237; [1975] 1 WLR 61, the Court of Appeal held that the two contracts entered into between the two members of the pop group, Fleetwood Mac, with a publishing company, whereby they undertook to grant the publishing company the worldwide copyright in all the works composed by them over a period of ten years, were made between parties with unequal bargaining power, and therefore ought to be set aside.

In the *Elton John*'s case, decided in 1985 (*Elton John & Ors v Richard Leon James & Ors* [1991] FSR 397), Elton John and Bernie Taupin signed an exclusive publishing agreement with a publishing firm, Dick James Music Ltd (DJM). This contract was the first in a series of contracts signed by the two young musicians beginning in 1967, the others being an exclusive recording agreement with DJM's subsidiary, and a management agreement between Elton John and DJM. Under the publishing agreement, both the composers assigned to DJM the full copyright throughout the world in all their musical compositions made during the term of their agreement. The agreement was for three years, renewal for a further period of three years at the option of either party.

When the validity of these agreements was subsequently challenged, the trial judge (Nicholls J), held that, in principle, the agreements ought to be set aside on the grounds of undue influence; though because of the long delay in bringing the action, such a remedy, in the instant case, was not appropriate. A

In *O'Sullivan v Management Agency and Music Co Ltd* [1985] QB 428; [1985] 3 All ER 351; [1984] 3 WLR 488, an exclusive management contract entered into by the well-known singer, Gilbert O'Sullivan, with his manager, was held to have been obtained by undue influence. B

More recently, in *Silverstone Records v Gary Mountfield & Ors* (1991) (unreported but a full transcript of the judgment was submitted to the court by counsel for the defendants), the two agreements entered into by the artistes (Stone Roses) with the recording and publishing companies were held to be in restraint of trade and being unreasonable on the grounds that they were oppressive, and imposed unjustified and unjustifiable restraint of trade. C D

Finally, since the completion of the hearing of the present case, another decision has now been delivered by the English courts. On 21 June 1994, Parker J, in the case of *Panayiotou & Ors v Sony Music Entertainment (UK) Ltd* (*The Times*, 30 June 1994) ('the George Michael case'), delivered a 273-page judgment holding that an exclusive contract entered into by George Michael, a former member of the pop group, Wham!, with Sony for a duration of 15 years, which contract, it is said, was described by George Michael in evidence as a 'slavery arrangement', was not open to challenge as being in restraint of trade. E

In 1982, George Michael, a member of the pop-group Wham!, entered into a recording agreement with Inner Vision. In 1983, Wham!'s solicitors wrote to Inner Vision claiming that the agreement was void because it was in restraint of trade. This led to legal proceedings between Wham! and Inner Vision. The legal proceedings were compromised by agreement, whereby a new recording agreement was entered into between Wham! and CBS ('the 1984 agreement'). In 1987, when George Michael left Wham!, and went solo, the terms of the 1984 agreement were re-negotiated with CBS at the request of George Michael. This re-negotiation, led to the making of a new recording agreement between George Michael and CBS in 1988 ('the 1988 agreement'). F G

The 1988 agreement contained improved financial terms for George Michael. In 1988 also, CBS was taken over by Sony. For tax reasons, George Michael requested Sony to bring forward the date of payment of various sums due to become payable to him under the 1988 agreement. Sony agreed, and in 1988, paid George Michael by way of advances and royalties under the 1988 agreement, a total of £11m. H I

In 1990, again at George Michael's request, further negotiations took place which resulted in a variation agreement. In 1992, George

A Michael commenced the present action against Sony claiming that the 1988 agreement was void, inter alia, on the grounds of restraint of trade.

The action brought by George Michael was dismissed.

The full judgment of Parker J is yet to be reported. However, from the brief report in *The Times* and from the summary of judgment, the B following reasons were given by Parker J for holding the agreement not to be void on the ground of restraint of trade:

> In the first place, I am satisfied that the terms of the 1988 agreement are reasonable and fair, and that accordingly the 1988 agreement is not an unreasonable restraint of trade ...
>
> C In the second place, I conclude that in any event on the facts of this case it is not open to George Michael to challenge the 1988 agreement on grounds of restraint of trade. There are three reasons for this conclusion, all of which are set out and explained fully in the written judgment. In summary form, they are as follows:
>
> D (1) There is a public interest in enforcing agreements reached by way of compromise of disputes. The 1984 agreement formed part of the arrangements for the compromise of the legal proceedings between Wham! and Inner Vision, in which Wham! was claiming that the Inner Vision agreement was unenforceable as an unreasonable restraint of trade. In such circumstances it was not open to George Michael to claim that the 1984 agreement was in turn unenforceable as an E unreasonable restraint of trade. It follows that since the 1988 agreement is a renegotiation of the 1984 agreement, the same applies to the 1988 agreement.
>
> (2) It would be unjust to Sony if the 1988 agreement were now treated as unenforceable or void because: (a) George Michael at all times had F expert legal advice and was well aware of the doctrine of restraint of trade; (b) Sony's agreement to bring forward the dates of various payments due to become payable to George Michael under the 1988 agreement, so as to enable George Michael to receive such sums during 1988; (c) the variation agreement dated 26 July 1990; and (d) George Michael's request for payment of the advance due in respect of the G third album.
>
> (3) By requesting the advance for the third album when he knew it was open to him to challenge the 1988 agreement on the grounds of restraint of trade, George Michael affirmed the 1988 agreement; and he cannot resile from that affirmation.

Within this brief space of time, since the judgment was delivered, the H decision of Parker J in this case, has generated much public reaction. In one of the many commentaries on the case, Patrick Isherwood in an article published in *The Times*, 28 June 1994, under the title, 'Why "slavery" is fair trade', writes:

> I The judge has perhaps trodden a different path from many of his predecessors and in so doing has given what might be described as a 'recording industry judgment' rather than passing judgment upon it.

(See also Baidura Ahmad, in *The New Straits Times*, 18 July 1994).

With the above background to the relevant English cases where the validity of similar recording contracts was considered, I now move on to consider the facts and issues of the present case.

Facts

The plaintiffs, Polygram Records Sdn Bhd ('the company'), are a music and sound recording company with a registered office in Kuala Lumpur. The first five defendants are the current members of a group of young Malaysian musicians, known as The Search ('the group'). The group was formed in 1981, and at the time of the formation of the group, the members of the group were Hillary Ang, Yazit Ahmad and Nasir Daud.

(A) THE FIRST CONTRACT

On 7 October 1984, the plaintiffs entered into a written agreement (P1) (hereinafter referred to as 'the first contract'), with the group. However, when the first contract was entered into, the group comprised Nasir Daud, Suheimi Abdul Rahman, Yazit Ahmad, Rahman Mahmood and Nordin Mohd Taib.

The first contract was for a period of two years, with an option for two further periods of one year each. This option was only exercisable at the discretion of the plaintiffs, and not the defendants. The contract also stated that the group was to record a minimum recordings of 24 songs in the first two years, and 20 songs during each option period, though the obligation appears to be on Polygram to make the recordings: cl 6(iii).

The circumstances under which this recording contract was entered into is, as stated by Mr Eric Yeoh (Eric), the managing director of Polygram Records, as follows: In 1983, when Eric was then the artiste and repertoire manager, he met The Search when the group was performing at a pub, called the Hard Rock Cafe, in Petaling Jaya. Having been impressed by their performance, Eric decided to sign them on as recording artistes. This was the first time that the company was signing a 'hard-rock group' as one of their recording artistes. Eric said that he offered the group the standard recording terms. According to Eric, the prevailing royalty rates applicable then was 4–5%.

At the time when the first contract was entered into, the group was still performing at the Hard Rock Cafe. The owner of the Hard Rock Cafe, Mr Gary Chew (Gary), acted as a go-between during the discussions between Eric and the group. Gary, in his evidence, said that when Eric gave a copy of the draft agreement to the group, he, with his limited experience, explained to the group some salient features of the contract. He said that the group was very keen to accept the offer made by Eric and made no counter-proposals. In any case, he said that he thought that the terms relating to the duration of the contract and the payment of royalty 'were reasonable'.

A (B) THE SECOND CONTRACT

A few months after the first contract was entered into, that is, eight months later, Eric felt the need for a new contract to be entered into as there were some changes in the composition of the group.

B On 12 June 1985, a new contract (P4) (hereinafter referred to as 'the second contract') was subsequently entered into between the plaintiffs and the group. At the time when the second contract was entered into, the members of The Search comprised Amran bin Marsiman ('Amran'); Rahman bin Mahmood ('Rahman'); the second defendant ('Suheimi'); the third defendant ('Yazit'); and the fifth defendant ('Nordin'). Hillary C Ang was not a member of the group then, and as such was not a party to the second contract.

Though the second contract contained many provisions which were identical to that contained in the first contract, there were certain significant modifications made. Under cl 6(ii) of the second contract, the period of D option which the members of the group granted to the company was extended to two additional periods of 24 months each, instead of the two additional periods of 12 months each under the first contract. Under both the contracts, however, the option was exercisable only at the discretion of Polygram, and not by the members of the group. In effect, therefore, under the second agreement, the group could have been tied to Polygram E for a period of six years commencing from the date of the second agreement, ie 12 June 1985 to 11 June 1991, whereas under the first contract, they would have been bound only from 1984 to 1988, at the latest.

The second contract also contained another significant modification: this related to the number of recordings. Under the first contract, by virtue F of cl 6(iii), the company was bound to make 20 recordings during the initial period of the contract, whereas under the second contract, the company was bound only to record ten recordings. The number of recordings during the option period was also reduced from 20 sound recordings in one year under the first contract, to ten sound recordings over a period of two years.

G Though the number of songs to be recorded was stated in the second contract, like the first contract, the second contract also contained a general provision entitling the company at its discretion to require the group to perform any additional number of musical works for the purposes of making more sound recordings: cl 6(iii).

H The circumstances under which the second contract was entered into was as follows: whilst the group was in Singapore, at the Lion's Studio, rehearsing some recordings for their first album, Eric called the members of the group out of the recording room and asked them to sign the second contract. Eric told them that as there were some changes in the I composition of the band, there was a need for this new contract to be signed. According to the members of the group who gave evidence, Eric did not inform them as to the other changes made to the terms of the second contract, especially that relating to the option period. In fact, they said that Eric hardly explained any of the terms of the new contract to them, but merely asked them to sign it by assuring them that it was necessary to accommodate the changes in the composition of the group.

It was also established during the trial that no copy of the second contract was ever given to the group until in 1987, when the solicitor acting for the group, requested a copy of it for the purposes of the present action. I should also point out that, as emphasized by counsel for the defendants, though the second contract was entered into in June 1985, it was not stamped until 26 November 1987, just before it was supplied to the defendants' solicitors.

(C) CHANGES IN THE GROUP

A few months after the second contract was entered into, Amran and Rahman left the group, and the group was joined by the first defendant ('Hillary') and the fourth defendant ('Nasir'). The plaintiffs, however, did not feel the need to draw up a new contract to accommodate this change. As such, no new agreement, as was the case previously, was entered into between the plaintiffs and the newly constituted group. According to Eric, the parties, however, proceeded on the basis that the second contract was binding on each of the members of the group. Hillary and Nasir, together with the other members, participated in the recordings and the production of the new recording albums, and in the sharing of the royalties which were payable to the group.

(D) RECORDINGS

In August 1985, the first album (Cinta Buatan Malaysia), was released by the group. It sold well over 20,000 copies, and according to Eric, 'it was a big success then'. In June 1986, the second album (Langit dan Bumi) was released. This album sold over 30,000 copies and in February 1987, the third album was released. The third album (Mentari Merah Diufuk Timur) 'was received very well, with 50,000 copies being sold'.

Whilst in Singapore, recording the third album, the group also recorded seven other songs. These songs were subsequently released by Polygram, after the group had left Polygram and had joined the second company. I shall refer to these songs in the later part of this judgment.

(E) DISSATISFACTION BY THE GROUP WITH POLYGRAM

After the release of the third album in February 1987, it was clear that the group was dissatisfied with their existing arrangements with Polygram. The group complained to Eric that they were unhappy with the royalty rates. Eric agreed to raise the royalty rate to 10% provided the group entered into a new contract. However, no new contract was signed, and no changes in the royalty rates were made.

Another main cause of dissatisfaction was the fact that despite the outstanding success of their records, the group was not presented with any gold or platinum award by Polygram. It was established in evidence that it was the standard practice in the recording industry that any artiste whose album reached the 20,000 mark, was presented with a gold disc, whilst those who reached the 50,000 mark were presented with a platinum disc. In evidence, no satisfactory explanation was given, either by Eric or Billy Tan, as to why Polygram did not make this presentation to the group, except to say that as certain criminal proceedings were pending against two members of the group (though the two members of the group were subsequently acquitted of the offence for which they were charged), Polygram did not think it appropriate to do so.

Eric also stated in evidence that besides royalty rates, the group also complained to him about the lack of publicity and promotion.

(F) GO-SEARCH AND PACIFIC MUSIC CORP (M) SDN BHD ('PMC')

Sometime at the end of 1987, the group made the recording of an album entitled 'Fenomena' in Jakarta under a new company, Go-Search. Go-Search was said to be a company incorporated by the members of the group themselves. The company did only the recordings, whilst another company, PMC (the sixth defendant) did the distribution. The success of the group, after leaving Polygram, was said to be overwhelming.

Soon after, that is, after the group had begun recording for Go-Search, Polygram itself released the seven songs which the group had earlier recorded with Polygram, as the group's fourth album.

(G) PRESENT ACTION

The present action was then commenced by Polygram in 1988 against the group (the first five defendants), for breach of contract, and also against PMC (the sixth defendant), for inducing the group to breach their contract with Polygram. In their statement of claim, the plaintiffs sought the following reliefs:

(1) An injunction to restrain the first five named defendants jointly and severally until further order or until 11 June 1989 from:

  (i) holding themselves out as being free to enter into any recording contracts with any other recording company whether such other recording company/companies belong to or are controlled by them individually or jointly;

  (ii) entering into any distribution contracts with PMC or any other company whether owned or controlled by them individually or jointly for the distribution of recordings that have been recorded by them whether for themselves, others or the plaintiffs; and

  (iii) recording for any other recording company including Go Search Sdn Bhd except the plaintiffs.

(2) An injunction to restrain the sixth named defendants whether by their directors, servants or agents until further order or until 11 June 1989 from:

  (i) entering into any distributorship agreement with the first five named defendants for purposes of distributing and or offering for sales musical recordings of the said first five named defendants whether such recordings were recorded by Go Search Sdn Bhd or any other company; and

  (ii) distributing and or offering for sale musical recordings of the said first five named defendants whether such recordings were recorded by Go Search Sdn Bhd or any other company.

(3) An order for full discovery of all relevant documents relating to the defendants' recording and distribution arrangements in respect of their sound recordings with any other person, firms or companies other than the plaintiffs which are in the possession of the defendants jointly or severally.

(4) An inquiry as to damages or at the plaintiffs' option an account of profits and payment to the plaintiffs of all sums found due upon taking such inquiry or account.

The defendants also counterclaimed for the following reliefs:

(1) (a) a declaration that any contracts signed between the plaintiff and the first five defendants are void by reason of the plaintiff's undue influence over the said defendants;

  (b) reassignment of the relevant copyrights in all the affected songs to the affected first five defendants; and

  (c) an account of profits by virtue of (a) and (b) above.

(2) (a) In the alternative, a declaration that the members of Search ceased to be bound by any contract with the plaintiff:

    (i) with effect from 12 June 1987, at the latest by effluxion of time; and/or

    (ii) by reason of the plaintiff's breach.

  (b) A declaration that cl 6(v) of the second document is void in restraint of trade.

Though this action was filed six years ago, because of certain applications, especially the one relating to the interlocutory injunction, and the subsequent appeal to the Supreme Court from the decision of the High Court (*Polygram Records Sdn Bhd v Hillary Ang & Ors* [1988] 3 MLJ 37), against the granting of the injunction, together with the several applications made by both the parties for the amendment of the pleadings, there was considerable delay in the fixing of the date of this trial.

The trial finally commenced in March 1993. During the trial, several witnesses were called, and it was not until July 1994 that final submissions were made by counsel.

A **Issues**

The crux of the issue before this court is whether at the time when the group began recording for Go-Search, that is, in late 1987, the group was still contractually bound to Polygram, either under the terms of the first contract or the second contract.

B The plaintiffs, contend that in late 1987, the second contract was still in force, or, in the alternative, if the second contract was unenforceable, the group was still bound by the terms of the first contract. The defendants, however, contend that at the end of 1987, they were neither bound by the first, nor the second contract: the first contract had, by then been rescinded; C or if it was valid, it had lapsed by this time, and as far the second contract was concerned, it was not binding on them as it was voidable, and therefore unenforceable.

To determine these issues, I, therefore, need to consider the terms of each of these two contracts. However, before I do so, I wish to make a D preliminary observation on the issue of the parties to the present action.

Preliminary observation: parties

Both the first contract in 1984, and the second contract in 1985, were entered into by Polygram with the individual members of the group which E were then part of The Search, at that particular time. When the first contract was entered into, it was between Polygram and Nasir, Suheimi, Yazit, Rahman and Nordin; whereas when the second contract was signed, it was between Polygram and Amran, Suheimi, Yazit, Rahman and Nordin.

It will be noticed that Hillary Ang (the first defendant), was never a F signatory to either of the contracts, whereas Rahman, a party to the first contract, and Amran, a party to the second contract were not cited as parties to the present action.

Further, an interesting feature of both these contracts is that a standard form contract was used which had, quite obviously been taken G from certain English precedents, oblivious to the person who prepared the contract, that such similar contracts had already come under close scrutiny by the English courts. In 1974 and 1975, similar contracts as the present, were already struck down by the English courts as being void or voidable.

Another feature of both of the contracts is that no modifications were made to the standard form contract to accommodate the fact that, in the H present case, a group, and not an individual singer was being contracted as an artiste. Throughout the contract, reference is made as though, each and everyone of the members of the group was entering into a separate and individual contract with Polygram, though the artistes together are referred to as The Search. This may well have been the intention as there is nothing I to indicate that the group at that stage had any other legal entity.

Therefore, if the contract was with individual members of the group, then clearly only those who were parties to the relevant contract are bound by the terms of that particular contract. However, if it was intended that the contract was to be with Polygram and The Search, as a group, then the A legal status of the group is unclear: what is the legal capacity of the group — an association, a corporation, a partnership, or merely as individuals. In *Clifford Davis*'s case 1975] 1 All ER 237; [1975] 1 WLR 61, the group, Fleetwood Mac was a limited company, and therefore the management contract was entered into with the company. The advantage of such an B entity is obvious: as the contract is entered into with a legal entity, any change in the membership of the group would not affect the legal status of the contract. The contract remained with the company and not with the individual members. I should, however, point out, that the contract with the two composers in *Clifford Davis*'s case was entered into on an individual basis. This was necessary as not all members of the group were composers. C In other words, the management contract in Clifford Davis with Fleetwood Mac as singers was entered into with the company, whereas that between the two composers, who were also part of the group, was between the management company and McVie and Welch (the composers) individually.

These issues were not directly addressed by the defendants to challenge D the liability of some of the defendants, especially Hillary, who was not a party to either the first or second contract. I, therefore, need not determine this issue. Needless to say, recording companies and artistes need to pay more heed to such issues.

I now move on to consider the substantive issues involved in this E case.

Validity of the first contract (1984)

The plaintiffs take the stand that, though the first contract was validly entered into, it was subsequently substituted by the second contract. The F defendants, however, contend that the first contract was unenforceable, and as such the defendants were not contractually bound by the terms of the first contract.

The defendants attacked the validity of the first contract on several grounds, the more important of which may be summarized as follows: G (a) that though they executed the first contract, they did not agree to the terms contained therein; (b) they were induced to sign the first contract by misrepresentation; (c) in the alternative, they claim that even if the first contract was valid, it had been discharged by effluxion of time on 12 June 1987, when the initial period of the contract expired, with no further extension, as the plaintiffs had not exercised any option to extend it; H (d) finally, the defendants contend that the first contract had been rescinded and substituted by the second contract.

(A) MISREPRESENTATION AND UNDUE INFLUENCE

I need not go into the details of the circumstances under which the first I contract was entered into. These have already been stated. What, however, is clear is that the group, at that particular time, was desirous of entering into a recording contract with Polygram. They had spoken to Eric and

A Nasir about this, and they had Gary to assist them at that stage. Though Gary was not their manager nor a lawyer by profession, he was in a position to advise them as to the terms of the contract. Furthermore, from his evidence, it is clear that he had the interests of the members of the group, when he explained to them the terms of the contract. But the important factor to bear in mind is that the members of the group at that B stage had made no recordings with any recording companies before, and were therefore keen to begin a recording career by entering into a relationship with a reputable recording company for this purpose. There was, therefore a clear intention on their part to enter into the recording contract with Polygram.

C Considering the circumstances and the evidence adduced, the group would be hard-pressed now to assert that the first contract was entered into by misrepresentation. The members of the group understood the nature of the contract; the duration of the contract; their obligations to record for Polygram; and, though they may not have fully understood the D mechanics of how the royalty rates were to be computed, they understood that royalties would be paid to them. Furthermore, Eric had told them that it was a standard form contract used by the company for all artistes employed by the company.

In the light of the above findings, I can find no impropriety on the part of Eric to extract any unfair advantage from the defendants when the E first contract was signed. On the contrary, it appears to have been executed, as any other contract, between two consenting parties.

I, therefore, hold that there was no misrepresentation, and, least of all, undue influence when the defendants entered into the first contract.

F (B) NON EST FACTUM

The other argument of the defendants that the first contract, though executed by them, is not binding on them since they did not 'agree to the terms,' can be dismissed summarily. There is no principle of law which states that where a party does not fully understand certain terms of a G contract, the contract may be vitiated. The general principle of law, of course, is that a party who signs a written contract is bound by the terms of the contract, except in the limited cases where fraud, undue influence, or misrepresentation may be established. This rule is so strict that even if a party to a contract has not read the contents of a contract, he is held to H be bound by its terms. In the leading case of *L'Estrange v F Graucob* [1934] 2 KB 394, Scrutton LJ pronounced (at p 403):

> When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

I

One exceptional circumstance under which a party to a written contract may seek to set it aside is on the grounds of non est factum, which by itself is usually difficult to establish. Non est factum, has not been pleaded in the

A present case to challenge the validity of the first contract, and even it had been, I doubt very much whether the defendants would have been successful in establishing it. From the evidence, the defendants would not be in a position to establish that the contract entered into by the defendants was 'radically or substantially or fundamentally' different to that they had intended to sign: see generally *Chitty on Contract, General Principles* B (26th Ed) at para 365.

(c) DISCHARGE OF FIRST CONTRACT BY EFFLUXION OF TIME

The first contract was entered into on 7 October 1984. By cl 6 of the said contract, it was stated that 'the term of this agreement is from 15 October C 1984 to 14 October 1986'.

However, by cl 6(ii), it was provided that:

> the artiste grants the company the irrevocable option to extend the term of this agreement for two additional periods of 12 months each commencing from the expiration of this agreement upon all the terms and conditions D herein contained other than these options to renew, provided always that the company shall have observed and performed its obligations listed in this agreement.

It is argued by the defendants that as at November 1987, the first contract had lapsed under cl 6, or in any case, as the plaintiffs had not exercised E their option to extend the contract for any additional periods thereafter, the defendants had been discharged of their obligations under the first contract to the plaintiffs.

Whilst it is true that the initial period of the first contract expired on 6 October 1986, whether the obligations of the defendants ceased on that F particular date, or whether it was further extended by the exercise of the option by the plaintiffs has to be examined. It should be noted, that under cl 6(ii), the plaintiffs had a right, with no such corresponding right being conferred on the defendants, to extend the duration of the contract for two further periods of one year each. In other words, the defendants, by the exercise of the option by the plaintiffs, could be tied to the plaintiffs for the G following periods:

Initial period:	7 October 1984 to 6 October 1986
First option period:	7 October 1986 to 6 October 1987
Second option period:	7 October 1987 to 6 October 1988

H

Did then the plaintiffs exercise their rights under the option to extend the duration of the first contract firstly to 1987, and secondly, by the exercise of the second option to 1988?

There is no evidence before this court of any formal document being executed to indicate that the duration of the initial period of the contract I had been extended by the exercise of the option under cl 6(ii). The defendants, argue that in the absence of any evidence indicating that the option period was extended, there was no exercise of this right by the

A plaintiffs, and as such, the first contract (if it was valid) expired on 6 October 1986.

The plaintiffs, however, on the other hand, argue that the fact that both the plaintiffs and the defendants continued to conduct themselves in such a manner as though the parties were still bound by the terms of the first contract, clearly evinced an intention on the part of both the parties B that the contract was extended. The plaintiffs further contend that the very fact that the defendants made 17 recordings, ten for the third album and the balance of the seven for the fourth album in early 1987, clearly indicated that the plaintiffs had exercised their option to extend the contract, and that the defendants in so recording these 17 recordings, were C aware of the extension, and accepted it and acted upon it.

This argument of the plaintiffs, is refuted by the defendants by saying that at the time they did the 17 recordings in Singapore in early 1987, they were told by the plaintiffs that under the second contract, they were, in early 1987, contractually bound to Polygram to make these recordings. D They also believed that as they had signed the second contract in 1985, which was for the duration of at least two years, they were bound to make the recordings for the third album.

I accept the defendants' explanation as to why, in early 1987, they undertook to do the recordings. They were at this stage aware that under E the second contract entered into in 1985, they were still bound in early 1987 to do the recordings. In fact, it is also clear that the plaintiffs themselves, shared a similar belief. The plaintiffs were of the view that as the first contract had been substituted by the second contract in 1985, in early 1987, the recordings were made under the initial period of the second contract, and as such there was no need for any formal document F to be executed at that stage, to extend the duration of the first contract in exercise of the option. The plaintiffs at that stage, believed, and continued to do so, that as the first contract was substituted by the second contract, the second contract was valid, and as such even when the third album was released in 1987, both the parties were acting under the terms of the G second contract. The plaintiffs, therefore, cannot now be heard to say that the recordings made in Singapore in early 1987, and the release of the third album in February 1987, was undertaken during the period of the option under the first contract.

But one thing is clear — in early 1987, when the 17 recordings were made in Singapore and soon thereafter when the third album was released, H both the parties were acting on the belief that the recordings were being made under the currency of the second contract. Both the parties were acting on the belief that each of them was bound by the terms of the second contract, and not the first contract. Therefore, no question as to whether the option under the first contract was exercised, such that the I duration of it was ever extended to early 1987 arises. Such an intention was clearly not in the minds of either of the parties — both acting on the belief that the second contract was in force, nor does the evidence support such a contention.

In any case, it must be emphasized that the plaintiffs themselves never contemplated any extension of the first contract, as they had always acted in the belief that the first contract was substituted by the second. A

(D) WHETHER THE 1984 AGREEMENT WAS SUBSTITUTED BY THE 1985 AGREEMENT

B

Whatever the legal effect of the first contract, one thing is clear: the plaintiffs intended to substitute the first contract with the second contract. As eight months had lapsed after the first contract was entered into, with no recordings being made by the group, together with the fact that there were changes made to the group, the plaintiffs felt the need for the first contract to be replaced by another. Hence, the plaintiffs convinced the group to sign the second contract. C

The members of the group, on their part, accepting the reason that there was a need for a new contract, especially because they were told that it was necessary because of the change in membership of the group, signed the new contract, to replace the first contract. D

There is, therefore, clear evidence that both the parties, especially the plaintiffs, intended to rescind the first contract, and substitute it with the second. Though the plaintiffs may have achieved their very same objectives by varying the terms of the first contract, they chose to rescind it, in substitution for another. Of course, the plaintiffs had this right to do so, especially, with the consent of the group, to rescind the first contract. As *Chitty on Contracts, General Principles* (26th Ed) at para 1592 points out: E

> Rescission by agreement
>
> Where a contract is executory on both sides, that is to say, where neither party has performed the whole of his obligations under it, it may be rescinded by mutual agreement, express or implied. F

Furthermore, the substitution of the first contract by the second, is a clear indication of the intention of both the parties to rescind the first contract.

The effect of such a rescission by mutual agreement is clear: the first contract is extinguished. This is unlike a variation, where the old contract continues to exist in the altered form: *Chitty on Contracts*, above at para 1595. In the Privy Council decision in *United Dominions Corp (Jamaica) Ltd v Michael Mitri Shoucair* [1969] 1 AC 340; [1968] 3 WLR 893, Lord Devlin said ([1969] 1 AC 340 at p 348; [1968] 3 WLR 893 at p 897): 'If the new agreement reveals an intention to rescind the old, the old goes; and if it does not, the old remains in force and unamended.' G H

The position under the Contracts Act 1950 ('the Act') is similar. Section 63 of the Act provides as follows: 'If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.' I

Section 63 is not limited in its scope to novation as it is understood under English law alone, but also covers situations where the parties have rescinded the earlier contract, by substituting a new one. If there is an

A intention on the part of both the parties to substitute a new contract, the old need not be performed, even if the new merely alters certain terms of the old. The test basically is this: if a new contract is entered into by the parties, whatever its terms, the old contract is extinguished. It does not, however, cover a situation where the terms of the old contract are merely altered or varied, without a new contract in substitution of it being entered B into. In such a case, the old contract, as altered or varied, remains in force.

In the present case, the clear intention of both the parties was to replace the first contract entered into in 1984, with a new contract, the second contract, entered into in 1985. The members of the group, therefore, were under no obligation to perform their part of the bargain under the C first contract, as the first contract had been extinguished. After substitution by the second contract, no rights or liabilities could arise out of the first contract.

(E) CONCLUSION — FIRST CONTRACT

D I, therefore, conclude that for the reasons stated above, the first contract was not in force at the time when the group began recording for Go-Search. Therefore, no question as to the members of the group having breached their obligations under the first contract arises in this case.

I, therefore, now move on to consider whether the group was bound E by the terms of the second contract, when they began recording for Go-Search in 1987.

Validity of the second contract (1985)

Like the challenge made on the first contract, the defendants launched a F similar attack on the validity of the second contract. The second contract was challenged by the defendants on the grounds that it was entered into (i) by false misrepresentation made by the plaintiffs; (ii) that it was void as it was obtained by undue influence; and (iii) that the contract was void as it was in restraint of trade. Alternatively, it was also contended by the defendants that as there was no exercise of the option by the plaintiffs to G extend the duration of the contract, the second contract expired on 12 June 1987, at the expiration of the initial period of two years stated in the second contract.

I have already stated in brief, the background and the circumstances under which the second contract was entered into. However, the H surrounding circumstances, and the details of the second contract have to be examined in greater detail to determine whether the defendants' allegations of misrepresentation and undue influence are sustainable.

(A) FALSE MISREPRESENTATION

I To substantiate their claim that the second agreement is voidable by reason of false misrepresentation, the defendants allege that Eric had orally misrepresented to the defendants the need for the second contract to be entered into. Eric had told them that the need for the second contract

A was solely because of the change in the composition of the group, when in fact, the true intention of the plaintiffs was to extend the period of the duration of the contract.

Eric, at first said in evidence that he found the need for the parties to enter into a second agreement because of the change in the membership of the group. In evidence, Eric further elaborated the other reasons for the B second contract to be signed. He said that as no recordings had been done for the first eight months under the first contract, to compensate for the loss of time, the new contract was deemed necessary so that a longer time was available for the defendants to make their recordings. It was for this reason that the new contract was made to commence from June 1985, with each of the two option periods being changed from one year to two years. C

This issue of false misrepresentation was not seriously pursued by the defendants. The effect of the contract entered into by false misrepresentation was not fully argued by the defendants, except for a general statement stating that the second contract was void by reason of false misrepresentation. No effort was made to state the effect of the agreement D entered into by false misrepresentation. The provisions of the Act were not referred to, nor any authorities submitted to support this contention. In any case, from the given facts, it does not appear to me that there is sufficient evidence to establish false misrepresentation.

E

(B) UNDUE INFLUENCE

The defendants' contention that the second contract is voidable on the grounds of undue influence merits more consideration than it did when a similar challenge was made of the first contract.

To substantiate their claim of undue influence, the defendants rely F on the following facts: The defendants were all unfamiliar with business matters; that the special relationship already existing between Eric and the defendants at the time when the second contract was entered into was such that the presumption of undue influence arose in this case; the lack of independent legal advice; and the total reliance by the defendants on Eric when they executed the second contract. G

The defendants contend that from the evidence of Eric, it is clear that the execution of the second contract took less than an hour, and that he was aware that all the defendants were not well versed in the English language. The defendants had also trusted Eric to act in their best interest. It was further argued that no evidence was adduced by the plaintiffs to H establish that the defendants had acted independently of any influence exerted by Eric.

Based on these facts alone, the defendants contend that as a fiduciary relationship was created between Eric and the defendants, and by the further fact that no independent advice had been relied upon by the I defendants, the contract was void for undue influence.

The relevant provisions of the law relating to undue influence are embodied in s 16 of the Act. Section 16 provides as follows:

A (1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another — B

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress. C

(3) (a) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the fact of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other. D

By virtue of s 20 of the Act, agreements entered into under undue influence are voidable, and not void, at the option of the party whose consent was obtained through undue influence. Such a contract is also voidable under English law: see *O'Sullivan v Management Agency and Music Co Ltd* [1985] E QB 428; [1985] 3 All ER 351; [1984] 3 WLR 488.

The doctrine of undue influence as embodied in s 16 of the Act is in substance based on the English position; see the Privy Council decisions in *Poosathurai v Kannappa Chettiar* (1919) 47 IA 1 and *Raghunath Prasad v Sarju Prasad* AIR (1924) PC 60 (Privy Council, India) on the interpretation F of the relevant provision of the Indian Contract Act which is in pari materia to s 16 of the Malaysian Contracts Act.

Undue influence may either be actual or presumed. In the recent House of Lords decision in *Barclays Bank plc v O'Brien & Anor* [1993] 4 All ER 417, Lord Browne-Wilkinson approved of the following classification G and effect of actual and presumed undue influence (at p 423):

> Class 1: actual undue influence. In these cases it is necessary for the claimant to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the particular transaction which is impugned.
>
> Class 2: presumed undue influence. In these cases the complainant only has H to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. In class 2 cases therefore there is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned: I once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely, for example by showing that the complainant had independent advice.

In cases of presumed undue influence, his Lordship pointed out, there were two ways in which a confidential relationship may be established (at p 423):

> Class 2A. Certain relationships (for example solicitor and client, medical advisor and patient) as a matter of law raise the presumption that undue influence has been exercised.
>
> Class 2B. Even if there is no relationship falling within class 2A, if the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence. In a class 2B case therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned.

Following this classification, quite obviously as there was no special relationship existing between Eric and the group, the defendants in the present case must be relying on presumed undue influence. Again, using the classification stated above, the relationship between the defendants and Eric must, if at all, fall within class 2B. It is, therefore necessary for the defendants to establish by evidence that the defendants reposed trust and confidence in Eric. This, of course, is a question of fact to be ascertained by this court. It is therefore necessary, for me to re-examine the facts of the present case to determine whether the defendants did repose such trust and confidence in Eric so as to raise the presumption of undue influence.

Soon after the first contract was signed, Gary, who had acted as the so-called adviser of the group, faded away when the group began recording with Polygram. Eric himself admitted in evidence that after the first contract was signed, he did not see Gary anymore with the group. From the evidence, it would appear that Polygram, and more precisely, Eric, in fact acted as the manager, at least for the purposes of recordings. Suheimi, in his evidence said:

> We did not have a manager — Eric always said he would take care of it — he said he will take care of our welfare, promotion, etc. So we thought he was our manager.

During this period too, the group became close to Billy Tan. Further, when questioned as to why the group signed the second contract, without reading or discussing the terms contained therein, Eric answered: 'Because they trusted me ...'. When asked: 'They trusted you because they thought you acted in their interest as well', Eric replied 'Yes'.

It should perhaps be pointed out too that under cl 9(iv) of the second contract, the group was prohibited from employing a manager, not only for purposes of recording but for purposes of public performance as well. The said clause reads as follows:

> The artiste shall not during the term of this agreement or any extension thereof without the company's prior written consent enter into agreement

> with any person, firm or company to act as his manager, agent or representative in dealing with recordings, song writing and music publishing, acting, singing and public performance on behalf of the artiste.

Therefore, without a manager being employed by them, the group relied on Eric and regarded him for all intents and purposes as their manager.

It is therefore clear that there did exist a close relationship between the group and Eric: see also the position of the manager in the cases of *Clifford Davis* [1975] 1 All ER 237; [1975] 1 WLR 61; *Elton John* [1991] FSR 397; and *O'Sullivan* [1985] QB 428; [1985] 3 All ER 351; [1984] 3 WLR 488. The relationship between Eric and the group was a relationship which, though not falling within the class 2A category, was one of trust and confidence, such that Eric was in a position to procure them to enter into the second contract. For these reasons, I am satisfied from the evidence that the relationship between the group and Eric was such that, the presumption of undue influence arises.

In this regard, I may also add that once the presumption of undue influence arises against Eric, as the employee of the plaintiffs, a similar presumption also arises against the plaintiffs themselves: see Waller LJ in *O'Sullivan*'s case ([1985] QB 428; [1985] 3 All ER 351 at p ; [1984] 3 WLR 488.

The defendants, having succeeded in so establishing that they reposed trust and confidence in Eric, need not go any further to prove that Eric did exert actual undue influence, or show that he abused such trust and confidence in relation to the second contract. Such being the case, the burden moves to the plaintiffs to disprove the existence of any undue influence: see s 16(3) of the Act.

In the present case, the plaintiffs have failed to adduce any evidence to disprove the existence of any undue influence. It was clearly established that the group had no independent advice given to them as to the terms of the second contract, albeit, the terms were similar to the first contract. There is even doubt as to whether the group was told that the period of contract and the option period was being extended. Finally, the conditions under which the group was asked to sign the second contract were also most appalling, to say the least: The boys were called out from the rehearsal room into another room where Eric was. A stack of money was next to Eric. Food allowance for their stay in Singapore was handed out to them. Eric then asked the boys to sign the second contract, saying that the terms were the same. The boys then signed the second contract and soon after Eric left the room. All this took place within a short space of one hour.

Manifest disadvantage

However, before the defendants may set aside the contract on the grounds of undue influence, it is necessary for the defendants to establish another element.

It was pointed out by the Privy Council in *Poosathurai v Kannappa Chettiar* (1919) LR 47 IA 1, that a party claiming to set aside a contract on the grounds of undue influence, under s 16 of the Indian Contract Act, which is in pari materia to s 16 of the Malaysian Contracts Act, cannot succeed in setting aside the contract unless, the party, besides establishing evidence of undue influence, also proves that the contract was 'unconscionable'.

The position under English law was also similar, though different terms were employed to describe the particular transaction. For example, Lord Scarman in the House of Lords decision in *National Westminster Bank plc v Morgan* [1985] AC 686; [1985] 1 All ER 821; [1985] 2 WLR 588, in also referring to the decision of the Privy Council in *Poosathurai* above, observed ([1985] AC 686 at p 704; [1985] 1 All ER 821 at p 827; [1985] 2 WLR 588 at p 597):

> ... I know of no reported authority where the transaction set aside was not to the manifest disadvantage of the person influenced. It would not always be a gift: it can be a 'hard and inequitable' agreement (see *Ormes v Beadel* (1860) 2 Giff 166 at p 174; 66 ER 70 at p 74); or a transaction 'immoderate and irrational' (see *Bank of Montreal v Stuart* [1911] AC 120 at p 137) or 'unconscionable' in that it was a sale at an undervalue (see *Poosathurai v Kannappa Chettiar* (1919) LR 47 Ind App 1 at pp 3–4).

His Lordship further added:

> Whatever the legal character of the transaction, the authorities show that it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence. In my judgment, therefore, the Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it.

It has long been generally accepted both by judges and textbook writers, that in every case where undue influence was being alleged, the party seeking to set aside the transaction must also establish some manifest disadvantage to the contracting party: see for example the decision of the Court of Appeal in *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923; [1992] 4 All ER 955; [1989] 2 WLR 759.

However, this requirement of manifest disadvantage has now been reviewed and re-examined by the House of Lords more recently in *CIBC Mortgages plc v Pitt & Anor* [1993] 4 All ER 433 (see also the more recent Court of Appeal decision in *Cheese v Thomas* [1994] 1 All ER 35). Lord Browne-Wilkinson, in overruling *Aboody*'s case, explained that the requirement of establishing manifest disadvantage was not applicable to cases of actual undue influence, but applied (if at all), only to cases of presumed undue influence. His Lordship also took the opportunity to explain the true meaning of Lord Scarman's observations in *Morgan*'s case, quoted above, as follows (at p 439):

A

> Despite two references in Lord Scarman's speech to cases of actual undue influence, as I read his speech he was primarily concerned to establish that disadvantage had to be shown, not as a constituent element of the cause of action for undue influence, but in order to raise a presumption of undue influence within class 2.

B Lord Browne-Wilkinson in *CIBC Mortgages* concluded as follows (at p 439):

> I therefore hold that a claimant who proves actual undue influence is not under the further burden of proving that the transaction induced by undue influence was manifestly disadvantageous: he is entitled as of right to have it set aside.

C

As the present case is one dealing with presumed undue influence, falling under the class 2B category, and not one of actual undue influence, I need to consider, following the Privy Council decision in *Poosathurai*, but bearing in mind the reservations expressed by Lord Browne-Wilkinson in *Pitt*'s case, whether the defendants have also succeeded in establishing that the D contract entered into by the defendants was 'unconscionable' or one of manifest disadvantage to them.

Let me now consider the terms and scope of the second contract: though as stated earlier, it contains many similar terms as that contained in the first contract, it makes only one major change, the duration of the E contract. The rest of the terms of the second contract are identical to that contained in the first contract. The plaintiffs have the exclusive right to make the recordings of the musical works of the group; the copyright of the group's sound recordings is assigned to the company; no payments, except royalties are to be paid to the group; an irrevocable option to extend the F contract is granted exclusively to the company alone with no corresponding right being conferred on the group; upon the termination of the contract, the group is restrained, for a period of two years, from performing as a singer in any part of the world for purposes of recording; if the group performed anywhere, subsequent to the termination of the contract with the plaintiffs without the plaintiffs' consent, the company had the right to G forfeit all royalties which are due and payable to the group. Finally, should the group fall ill and as a consequence become unable to fulfil their obligations under the contract, the company has the right to terminate the contract.

I need not decide whether any, or all these terms are enforceable. H Quite clearly, as will be seen later, some terms are clearly not enforceable, whilst others appear to be at the brink of being against public policy, and some others appear to be blatantly against the provisions of the Act.

The defendants have argued that, these terms contained in the second contract, entered into with no independent advice; with no I negotiations; with inequality of bargaining power between the contracting parties; together with the sinister circumstances under which it was executed, was, not only unfair, but also rendered the entire contract unconscionable.

However, on the analysis of the evidence before me, the defendants had a difficult task in establishing that the second contract was in fact unconscionable, or that it was manifestly disadvantageous to them. It must be emphasized that, in all respects, the second contract, except for the duration of the contract, was similar to the first contract. Both contracts were recording contracts, whereby the defendants' desire to become recording artistes was being achieved. True, some of the terms appear to be onerous, or may even, perhaps, be labelled as unconscionable. But at the same time, these terms were not new terms, but merely those which were already known to the defendants, by virtue of the first contract. Gary Chew had explained to them the salient features of the terms of the first contract. The defendants had accepted it and had acted upon it under the first contract for eight months. The defendants cannot now, therefore, be heard to say that they were not aware of the terms of the second contract or that it was an unconscionable bargain. Further, it must be borne in mind, that the second contract made no radical changes to the nature of the recording contract itself.

As for the duration of the contract, it is true that the period of the contract was being extended under the second contract. But this change in the duration of the contract by itself cannot render the entire contract to be manifestly disadvantageous to the defendants, though it be said that it appears to be unreasonable. The period of the second contract, may at the most, be for a maximum period of six years. It is not, as in the case of *Clifford Davis* [1975] 1 All ER 237; [1975] 1 WLR 61 or *Schroeder v Macaulay* [1974] 3 All ER 616; [1974] 1 WLR 1308 for a period of ten years. Though a period of six years may appear to be unreasonable, but considering the nature of the recording contract, under which both the recording company and the artistes themselves may need a reasonable time to achieve their respective objectives; the recording company to recoup its investments in promoting relatively unknown artistes; and the artistes' ambition to achieve recognition as a successful group, I am inclined to take the view that the duration of the second contract in the present case is not of such a duration so as to render the entire contract to be manifestly disadvantageous to the defendants. Manifest disadvantage, it is generally said, for purposes of the doctrine of undue influence, has to be a disadvantage which was so obvious to any independent and reasonable person who considered the transaction as a whole at the time it was entered into, with full knowledge of all the relevant facts. The mere overbearing of a person's will is not in itself a disadvantage in the relevant sense. Surely, in the present case, at the date when the second contract was entered into, no reasonable person, considering the commercial practice of the recording industry at that time would say that the second contract whereby the defendants undertook to record for the plaintiffs was clearly disadvantageous to the defendants.

I therefore hold, that as the defendants had failed to establish that the second contract as a whole, and not some of the terms contained therein, was 'manifestly disadvantageous' to them or that it was unconscionable, the defendants' attempt to set aside the second contract on the ground of undue influence fails.

Following the doubts raised by Lord Browne-Wilkinson in *Pitt*'s case [1993] 4 All ER 433, even if the element of manifest disadvantage need no longer be established as a separate requirement in cases of presumed undue influence, I doubt very much whether the defendants in the present case are in a position to set aside the second contract on the grounds of undue influence, as the defendants in the present case appear to have affirmed the contract. It is an established principle of law that affirmation of a voidable contract is a bar to the setting aside of the voidable contract.

In the present case, unlike the position taken by the artistes, in the cases of *O'Sullivan* [1985] QB 428; [1985] 3 All ER 351; [1984] 3 WLR 488, or *Elton John* [1991] FSR 397 or *Clifford Davis*, the defendants took no steps to set aside the contract but continued to fulfil their obligations under the second contract by recording for Polygram. It was only when the plaintiffs commenced the present action, did the defendants counterclaim for a declaration that the second (or the first) contract was 'void [sic] by reason of the plaintiff's undue influence'. I may also add that in the recent *George Michael* case (*The Times*, 30 June 1994) (unreported), one of the grounds for refusing to set aside the agreement entered into between George Michael and Sony, was the fact that as George Michael had affirmed the contract, he could not resile from that affirmation.

(c) EXTENSION OF THE SECOND CONTRACT

I now proceed to say a few words on the question as to whether the plaintiffs did exercise their option under the second contract so as to extend the said contract for a further period of two years.

The plaintiffs contend that as the defendants recorded more songs than they were obliged to do so for the third album, the defendants must have done so on the basis that the second contract was extended for a further period of two years. The defendants, however, deny this allegation, and say that there was no exercise of the option by the plaintiff of the second contract, and that the mere fact that the defendants recorded 17 songs, instead of ten, does not in any way indicate that there was any extension of the contract. The defendants explained that when they recorded the 17 songs in Singapore, they were unaware as to when exactly the second contract came to an end.

Furthermore as the evidence indicates, the defendants were told by the plaintiffs that they had to record 20 songs, though they only managed to do seventeen. It should be remembered that the defendants did the recording of the 17 songs within a short period of two weeks, even before some of the songs were composed.

There is no evidence, in my view, to indicate that the plaintiffs had told the defendants, that the extra seven songs were to be used for the fourth album which was to be released after the expiration of the initial period of the second contract. In fact, on the contrary, if the plaintiffs had decided to exercise their option to extend the duration of the second contract, there appears to be no reason as to why they then pressurized the defendants to record 20 songs within the two weeks. The plaintiffs could have asked the defendants to do the recordings for the fourth album, well after the release of their third album and during the extended period of the second contract.

I, therefore, hold that there is no evidence at all to indicate that the plaintiffs did exercise their option to extend the period of the second contract to a further term of two years.

Inequality of bargaining power

There was a weak attempt by the defence to challenge the validity of the second contract on the ground of inequality of bargaining power. This doctrine first gained some recognition in *Lloyds Bank Ltd v Bundy* [1975] QB 326; [1974] 3 All ER 757; [1974] 3 WLR 501, when Lord Denning expressed the view that the law recognizes the principle that relief against harsh or unfair contracts may be granted on the ground of inequality of bargaining power. It was applied again by Lord Denning in *Clifford Davis; Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep 98; and *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69; [1977] 3 All ER 498; [1977] 3 WLR 90, and by Lord Diplock in *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616; [1974] 1 WLR 1308. However, subsequent to these decisions, the doctrine gained little acceptance. In the House of Lords decision in *National Westminster Bank plc v Morgan* [1985] AC 686; [1985] 1 All ER 821; [1985] 2 WLR 588 and in the Privy Council decision in *Pao On v Lau Yiu Long* [1980] AC 614; [1979] 3 All ER 65; [1979] 3 WLR 435, Lord Scarman expressed doubts as to the existence of such a doctrine in the modern law of contract. In recent years, this doctrine has gained little judicial support, and as such, it has not been applied by the English courts in any major decision.

In Malaysia, though there is some support for the view that, public policy may, in some exceptional cases, demand that certain contracts which are grossly unfair to one of the parties to a contract ought to be set aside on the grounds of inequality of bargaining power under s 24(e) of the Act, there has been to date, no leading case in which this doctrine has been invoked by the Malaysian courts: see however, *Naested v State of Perak* (1925) 5 FMSLR 185, per Woodward CJ in the Court of Appeal at p 201; and Harun Hashim J in the High Court decision in *Yap Chee Meng v Ajinomoto (Malaysia) Bhd* [1978] 2 MLJ 249; and the Federal Court decision in *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196.

In the absence of any established precedent on this aspect of the law in Malaysia, and in view of my earlier findings that the second contract, as a whole, is not one which may be labelled as being grossly unfair to the defendants, I therefore make no findings as to whether the second contract may be set aside on the grounds of inequality of bargaining power.

A **Restraint of trade**

Clause 6(v) of the second contract (a similar provision was also contained in the first contract) provides as follows:

> B During the continuance of this agreement and in the case of the artiste being released from the artiste's obligation to make sound recordings for the company ... or in the case of the termination of this agreement ... then for a period of two years after the date upon which the company shall have released the artiste ... *the artiste shall not* without the written consent of the company ... *render the artiste's services ... in any part of the world as a singer or performer of musical works for the purposes of making records ...* (Emphasis added.)

C It is further provided that if the artiste commits a breach of this provision, the company has the right to forfeit all royalties, both accrued before the breach and those which are payable subsequently.

In this regard, I should also point out that under cl 6(i) of the second D contract, it is provided that the artiste, shall for the duration of the agreement, 'render the artiste's exclusive services to the company'.

Clearly, these provisions are reminiscent of the similar provisions which were considered by the English courts in *Schroeder v Macaulay*; *Clifford Davis*; the *Silverstone* case (1991) (unreported), and more recently in the *George Michael* case (*The Times*, 30 June 1994) (unreported).

E In *Schroeder*'s case, where a similar provision was considered, the House of Lords held the agreement to be contrary to public policy as being in restraint of trade, and thus void. In the *Clifford Davis* case, though Lord Denning did not consider the agreements in that particular case to be in restraint of trade, but merely 'restrictive of trade', His Lordship found that F as the agreements were made between parties of unequal bargaining power, there were strong arguments for saying that the agreements were entered into by undue influence or pressure. In *Silverstone*, it was held that the contract to render exclusive service to the recording company was an unfair restraint of trade as the contract as a whole was 'so entirely one-G sided and unfair that no competently advised artiste in the position of the Stone Roses would ever have agreed to sign it'. However, as pointed out earlier, in George Michael's case, it was held that as the agreement was reasonable and fair, it was not an unreasonable restraint of trade.

I may also add that in another Court of Appeal decision, *Zang Tumb Tuum Records v Holly Johnson* (*The Independent*, 2 August 1989) H (unreported), referred to in the *Silverstone* case), a similar recording contract was held to be unenforceable because it was an unreasonable restraint of trade. In that case, the Court of Appeal spelt out in detail the types of recording contracts which might be considered reasonable or unreasonable by the courts.

I An analysis of these cases indicates that the English courts have considered the doctrine of restraint of trade in two different circumstances: (a) restrictions which are imposed to apply after the expiration of the

contract; and (b) restrictions imposed during the currency of the contract, A
whereby the artiste undertakes to provide exclusive service to the recording company, usually without a concomitant obligation on the part of the recording company to provide the artiste with any opportunity to obtain independent income.

In considering both these types of covenants, the courts, besides B
relying on the doctrine of restraint of trade generally, have also considered its validity on the grounds of public policy, and in some cases, inequality of bargaining power, and undue influence or pressure.

I have been urged to apply these principles of law to the instant case. Before I do so, I need to consider whether these principles are in fact C
applicable in Malaysia, in the face of the specific provisions of the Malaysian Contracts Act, especially s 28 of the Act which provides as follows: 'Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.'

Exclusive recording rights during the currency of the contract D

At this juncture, I need only say that the scope of s 28 has not been clearly determined by the Malaysian courts so as to hold that exclusive service covenants which are applicable during the currency of a contract may be classified as contracts in restraint of trade. Whether a contract, under which a person agrees to provide exclusive service to the other during the E
currency of the contract, is a restraint of trade within the scope of s 28 therefore remains unclear. It would appear that as the test of reasonableness as that applied by the English courts to determine the validity of a contract in restraint of trade is also not applicable under s 28 of the Act, a restricted interpretation needs to be given to the section: see also the views expressed F
by Thorne J in *Hua Khiow Steamship Co Ltd v Chop Guan Hin* (1930) 1 MC 75. To otherwise hold that every contract which contains a covenant restricting a party from practising his trade or profession, both during the currency of the employment, and the post-employment period, as a contract in restraint of trade under s 28, would have far-reaching consequences on normal commercial contracts, such as the present one. G

Therefore, it appears to me that the covenant whereby the defendants undertook to provide exclusive recording rights to the plaintiffs during the currency of their recording contract, is not a covenant in restraint of trade and is therefore not rendered void under s 28 of the Act. Section 28 is only applicable in cases where a person is restrained from carrying on his trade H
or profession in the traditional sense of the doctrine, that is, in the post-contract period and not during the currency of the contract. In this regard, I hold that the English cases which have held such covenants to be in restraint of trade are distinguishable, as the law applied by the English courts differs to that which is applicable under the Act in Malaysia.

I

Post-contract restraint

Having said that, however, the validity of cl 6(v) stands on a different footing. Clause 6(v) which, I may add, is most inelegantly drafted, appears

A to prohibit the defendants from making any recordings in three different situations: (i) during the currency of the agreement (which appears to be redundant in view of a similar provision in cl 6(i)); (ii) during the currency of the agreement, if the defendants are released from their obligations to record for the plaintiffs; and (iii) after the expiry of the contract. It appears B that in situations (ii) and (iii), the defendants are prohibited from making any recordings, except with the written consent of the plaintiffs, for a period of two years thereafter.

The tenor of cl 6(v) is clearly that of a covenant in restraint of trade in the traditional sense. Whilst the validity of such covenants are tested by C the reasonableness test by the English courts, the position in Malaysia is different. Once the Malaysian courts take the view that a particular covenant is a covenant in restraint of trade, the courts have no discretion, but to declare it to be void under s 28 of the Act, subject to the three exceptions provided for by the said section: see also *Wrigglesworth v Wilson Anthony* [1964] MLJ 269.

D As none of these exceptions are applicable to the instant case, and having held that cl 6(v) is a covenant in restraint of trade, I hold cl 6(v) to be void and to be of no effect. As it is a void provision, it should further be deemed to be void ab initio, that is, from the time the second contract was entered into. I therefore, make a declaration to this effect, as prayed for by E the defendants in their counterclaim.

Summary of findings against the first five defendants

It may be useful, at this stage of this judgment, for me to summarize my findings against the first five defendants, before I consider the case against F the sixth defendant.

For reasons already stated above, the summary of my findings against the members of The Search who are defendants to the present action are as follows:

G (i) As the first contract was rescinded and substituted by the second contract in June 1985, the first contract entered into between Polygram and the group in 1984 was not binding on both the parties when the group began recording for Go-Search in 1987.

(ii) Alternatively, even if the first contract was valid and binding, the first contract expired on 6 October 1986, with no extension of its duration, H as there is no evidence to indicate that the plaintiffs did exercise their option to extend it for further periods of one year each. Therefore, even on this ground, the defendants were not bound by the first contract when they recorded for Go-Search in 1987.

(iii) As for the second contract entered into between the parties on I 12 June 1985, I hold that it was a valid and legally binding contract.

(iv) The defendants' challenge to set aside the second contract as being voidable on the grounds of undue influence is unsuccessful. Similarly, this court finds that the second contract, as a whole, is not voidable on the grounds of false misrepresentation, inequality of bargaining power, or restraint of trade. A

(v) The second contract, being valid, however expired on 11 June 1987. As there is no evidence that the duration of the second contract was extended for any further periods by the plaintiffs in exercise of their right, the second contract, having lapsed on 11 June 1987, was not B binding on the defendants at the time when they began recording for Go-Search.

(vi) Clause 6(v) of the second contract being a covenant in restraint of trade is void ab initio under s 28 of the Act. As such, cl 6(v) was not binding on the defendants at the time they began recording for Go-Search, C or any other company subsequent to 11 June 1987.

(vii) Therefore, it follows that the members of The Search were not in breach of any contract with Polygram when they began recording for Go-Search.

(viii) For the aforesaid reasons, the plaintiffs' claim against the first five D defendants fails.

(ix) The plaintiffs are to account and pay to the defendants all royalties in respect of all recordings done by the defendants, and recorded by the plaintiffs which have accrued to the defendants under the second contract. As the fourth album was recorded during the currency of E the second contract, though released after the expiration of it, the plaintiffs are to pay the defendants the royalties from the sale of the fourth album in accordance with the terms of the second contract.

I now move to consider the plaintiffs' claim against the sixth defendant.

F

Plaintiffs' case against the sixth defendant

As the first five defendants were not bound by any contract with the plaintiffs when they began recording for Go-Search, and as no question of any breach of contract arises vis-a-vis the plaintiffs and the first five defendants, the plaintiffs' claim against the sixth defendant for inducing G the group to breach their contract with Polygram, must necessarily fail. I, therefore, dismiss the plaintiffs' claim against the sixth defendant.

Other issues

There are two other issues relating the second contract which I feel H compelled to comment upon. The first relates to the issue of copyright, and the other, the payment of royalties due to the first five defendants.

(A) COPYRIGHT

The defendants have in their counterclaim sought a reassignment of the I relevant copyright in all the songs recorded by the group with the plaintiffs. Clause 3 of the second agreement provides that:

> The copyright in all sound recordings made under and by virtue of this agreement shall belong to the company and the artiste hereby assigns to the company any copyright in any arrangements or transcriptions of such musical works which may be made by the artiste.

It is clear from this clause, and under the law relating to copyright of sound recordings, that the copyright to the sound recordings belongs to the plaintiffs, and as such no question of reassignment of such copyright to the defendants arises in this case: as to the law relating to ownership and dealings in copyright of sound recordings, see the recently published work by Khaw Lake Tee, *Copyright Law in Malaysia* (1994) (Butterworths Asia), ch 5.

(B) PAYMENT OF ROYALTIES

As stated earlier, under cl 5 of the second contract, the defendants are entitled to royalties at the rate of 5%. However, on a closer reading of the second contract, it is provided under cl 5(6), that when the defendants are no longer contractually bound to the plaintiffs, they are only entitled to receive 50% of the royalty rates payable, and that too is limited to a period of five years only from the expiration of the second contract. The said clause reads as follows:

> Unless the artiste shall enter into a new artiste agreement with the company upon the expiration of this agreement including the option exercised by the company pursuant to cl 6(2) of this agreement, royalties in respect of all the said records produced under this agreement shall be 50% of the royalty rate provided for in this agreement for a period of five years only from such expiration.

I must confess that this provision in the second contract has caused some concern to me. It appears to me that this provision is completely inconsistent, or even repugnant to the main object of the recording contract entered into between the plaintiffs and the defendants. In a contract of this nature, that is, a recording contract, the main consideration of the contract is, surely the payment of royalties. In a recording contract, and, I may add, a publishing contract, the payment of royalties is the main consideration for the work undertaken by the singer or the author.

It is an accepted principle of interpretation of contracts that where a later clause in a contract destroys the effect of an earlier clause, or where a clause in a contract is inconsistent with the main object of the contract, the latter clause may be rejected as being repugnant to the earlier clause or to the main object of the contract: see Lewison, *The Interpretation of Contracts*, (1989) (Sweet & Maxwell) at paras 8.08 and 8.09. See also *Chitty on Contracts, General Principles* (26th Ed) at para 833.

In the light of the inconsistency between cl 5(1) and 5(6) of the second contract, and in applying the above principle of interpretation, I hold cl 5(6) to be void, and to be of no effect. The result of this, is that the defendants are entitled to receive royalties from the plaintiffs in accordance with cl 5(1) of the second contract.

Conclusion

My final findings on this case are as follows:

(A) THE PLAINTIFFS' CLAIM

(a) the plaintiffs' claim for an injunction to restrain the first five defendants from entering into any recording contracts with any other recording company is dismissed;

(b) the plaintiffs' claim for an injunction to restrain the five defendants from entering into any distribution contract with PMS or any other company is dismissed;

(c) the plaintiffs' claim for an injunction to restrain the first five defendants from recording for any other company, including Go-Search, is dismissed;

(d) an injunction to restrain the sixth defendant from entering into any distribution agreement with the first five named defendants for purposes of distributing musical recordings recorded by Go-Search or any other company, is dismissed;

(e) the plaintiff's claim for an injunction to restrain the sixth defendant from distributing, or offering for sale any musical recordings of the first five named defendants, whether such recordings were recorded by Go-Search, or any other company, is dismissed; and

(f) the order claimed by the plaintiffs for full discovery of relevant documents relating to the defendants' recordings and distribution arrangements in respect of their recordings with any other company is dismissed. The plaintiffs' claim to inquiry as to damages is also dismissed.

(B) THE DEFENDANTS' COUNTERCLAIM

(a) The declaration sought by the defendants that the contracts signed by the plaintiffs and the first five defendants are void by reason of plaintiffs' undue influence, is not granted.

(b) A declaration that cl 6(v) of the second contract is void as being in restraint of trade, is granted.

(c) A declaration that members of The Search ceased to be bound by any contract with the plaintiffs with effect from 12 June 1987, is granted.

(C) COPYRIGHT

The defendants' claim for a reassignment of the copyright in the sound recordings is dismissed.

(D) ROYALTIES

Finally, the plaintiffs are to pay the defendants all royalties due to them under the second contract in respect of the sales of all the four albums recorded by the group in accordance with cl 5(1) of the second contract.

Postscript

In the light of this judgment by this court, I take this opportunity to add that it may be timely for recording companies to review the terms of their recording contracts entered into by them with young artistes. Amongst the factors which recording companies need to take into consideration is the need for recording companies to ensure that the artistes have independent legal advice to advise them as to the proper scope of the terms of the contract; that the duration of the recording contract is reasonable; that any option to extend the duration of the recording contract is exercised with the consent of both the parties; that clear provisions exist in the recording contract to provide that if the contract is extended, the royalty rates will be renegotiated; and that covenants prohibiting the artistes from entering into contracts with other recording companies, after the expiration of the contract period are not incorporated into the recording contracts as such covenants are in restraint of trade and thus void under Malaysian law.

It may also be advisable for recording companies to review the ambit of any covenant providing for exclusive service of artistes during the currency of the contract, and possibly, even to consider whether the royalties payable and the copyright of the recordings should be modified so as to be in line with other contracts, like publishing contracts. I should further caution that the present practice of using standard form contracts should be reviewed, so that the terms of the contract reflect the true intention of both the parties.

Plaintiffs' claim dismissed with costs. Defendants' counterclaim allowed in part, with no order as to costs.

Reported by Jeanne Tan